

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STEPHEN J. OBERTO and KIM S.
OBERTO, husband and wife,

Plaintiffs,

V.

PLATYPUS MARINE, INC., a Washington corporation

Defendant.

Case No.: 3:16-cv-05320-BHS

IN ADMIRALTY

DECISION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

DECISION

In the world of commerce, disputes arise when expectations of parties to a contract are not fulfilled. When those unmet expectations are spelled out as contractual obligations, a cause of action for a breach of contract is often the result. Stephen and Kim Oberto (“Obertos”) come to this court seeking damages from Platypus Marine, Inc. (“Platypus”) because they claim that their yacht, MAXIMO, suffered damages caused by Platypus when it breached the contract to paint the vessel by delivering a faulty paint job.

At the conclusion of the three-day trial the Court ruled that Platypus had breached the contract it entered into with the Obertos for the work of painting the hull above the waterline when it admittedly failed to apply the specified Awlgrip paint manufactured by AkzoNobel “according to Manufacturer’s specifications and procedures.” Now the Court awards damages to the Obertos in the amount of \$58,775.86.

1 Because of Platypus' failure to properly test any suspect layers of paint over
2 which the coating was to be applied, it was learned after the paint job was completed
3 that some of the coatings underneath the new paint had been a one-part system which
4 was incompatible with the new Awlgrip two-part system. The consequence of this
5 discovery was that the new coatings left the surface soft, blistering and disintegrating
6 in spots throughout the MAXIMO's hull. Had a test been performed before the work
7 had begun, as prescribed by the manufacturer, the parties would have learned that the
8 new coating would likely not have adhered properly unless the surface of the hull was
9 taken down at least to the fairing layer.¹

10 While there was some dispute as to whether the incompatible layers included
11 the fairing compound, the most persuasive evidence was that layer 7, and not layer 9,
12 as shown in Exhibit 39, was fairing compound. The compatibility test performed by
13 AwlGrip revealed that layer 7 was incompatible with the AwlGrip two-part topcoat.
14 Consistent with those findings, AwlGrip, through Exhibit 48 entitled "Awlspec," dated
15 November 10, 2014 at Bates No. 386, prescribed taking the hull "back to its original
16 gel coat surface." Platypus now objects to this statement asserting that it is hearsay, but
17 no such objection was made at trial on this agreed exhibit. Marine surveyor Ronald M.
18 Reisner ("Reisner") in his testimony supported the AwlGrip recommendation that all
19 coatings be removed back to the original gel coat. His testimony, based upon his years
20 in the field of marine surveying and boat building, that layer 9 was gel coat and not
21 fairing compound, was the most clear and explicit evidence presented concerning the
22 interpretation of the AwlGrip test results.

23 What relevance this dispute has to the Court's decision is questionable. Neither
24 the Obertos nor Platypus entered into a contract that contemplated taking off all
25 undercoatings, including fairing compound, down to the gel coat. This option was

26 ¹ The fairing layer is the first layer of material over the fiberglass substrate which
27 smooths out defects in the hull and prepares it for top finishes.

1 considered and rejected by the Obertos in conversations held at the inception of the
2 relationship and contract as memorialized in the Captain's Report, which was admitted
3 as Exhibit 45. The scope of work was limited to sanding and painting. Had the
4 compatibility test been performed, a different contract involving substantially more
5 work and cost could have been considered and either the parties would have agreed (1)
6 to have the more extensive and expensive work performed; (2) to proceed with the
7 work that was ultimately performed; or (3) that no contract would be entered into and
8 no work would be performed.

9 At the conclusion of the trial the Court asked the parties to address through
10 post-trial briefing, among other things, the questions of whether Platypus could have
11 and would have cured the breach through the honoring of its warranty or whether the
12 Obertos foreclosed that opportunity.

13 Platypus had attempted to satisfy the Obertos by proposing a couple of different
14 solutions to addressing the paint problems. These included a "scuff and shoot,"
15 consisting essentially of sanding out the imperfections and reapplying a coat of paint,
16 or to do essentially the same work but apply white paint instead of the blue, which
17 would perform better since less solar heat would develop and thereby reduce the
18 potential for blistering and detachment of undercoatings. Apparently, neither of these
19 options were acceptable to the Obertos.

20 Discussions for cure did not end abruptly, as often is the case when parties in
21 contract disputes reach an impasse and further discussions are ruled out. Here, the last
22 communication on the matter from Judson Linnabary, the owner of Platypus, to the
23 Obertos was in a letter dated November, 13, 2014, and admitted at trial as Exhibit 58,
24 in which the alternatives for cure were laid out.

25 The Obertos' concluding communication was unclear as to what course they
26 might take. In an email addressed to Linnabary, dated November 25, 2014 and
27

1 admitted as trial Exhibit 60, the Obertos simply replied, "We are still investigating the
2 paint issues and evaluating our options. We will let you know."

3 In the end the Court cannot and need not determine whether Platypus was
4 denied the opportunity to cure its default. The failure to test the existing undercoats for
5 compatibility with the AwlGrip paint product at the beginning of the work was the
6 cause of the resulting damage to the paint, both under the new coat and the sublayers.
7 The evidence is unclear whether either of the proposed cures by Platypus would have,
8 in fact, solved the issues to any acceptable degree.

9 The question that was left to be decided is what remedy will be imposed by the
10 Court for Platypus' breach of contract. While there are a number of approaches that
11 have been or could have been argued, the fundamental principle in fashioning a
12 remedy is to make an award that, as reasonably as possible, best makes the injured
13 party whole; that is, the one that puts the non-breaching party in the place it was before
14 the contract was entered into, together with resulting damages, if proven, that arose
15 from the defective performance by the breaching party.

16 Given the nature of the breach of contract that arose at the inception of the
17 work, the best available remedy for that breach is for Platypus to refund to the Obertos
18 all moneys that it received under the contract. Although, conceivably other damages
19 could have been claimed such as loss of use or the marginal increase in cost of
20 removing the Platypus-applied coatings, there was no evidence admitted on these.
21 Perhaps that is just. Whatever the problems that still exist in the MAXIMO's painted
22 hull, no one has argued that its appearance is worse than when it first entered the
23 Platypus boatyard. The Obertos could conclude that they can live with the paint issues
24 and have a better paint job than they had previously, at no cost other than the cost of
25 this litigation.

26 Although the Court has determined that Platypus breached the parties' contract,
27 Platypus' breach and its acts while discussing potential cures did not constitute a

1 violation of the Washington Consumer Protection Act (“CPA”), RCW §19.86. In a
2 CPA claim, the plaintiff must prove, among other requirements, that an unfair or
3 deceptive act or practice has occurred that has an impact upon the public interest. The
4 closest the Obertos come to establishing an unfair or deceptive act is showing that
5 Platypus failed to produce all of the AkzoNobel report. However, this case involves a
6 private dispute between the Obertos and Platypus based on unique facts. None of the
7 actions of Platypus have the potential to deceive a substantial portion of the public.
8 Moreover, the Obertos have failed to show they were damaged by any failure to
9 produce the AkzoNobel report. Nor have the Obertos established that the failure to
10 produce the AkzoNobel report constituted a material misrepresentation of the
11 condition of the MAXIMO.

12 In addition to the foregoing, having heard and reviewed the testimony of the
13 witnesses, the evidence of records, and the contentions and arguments of counsel, the
14 Court, in accordance with Rule 52(a) of the Federal Rules of Civil Procedure, makes
15 additional findings of fact and conclusions of law as follows:

16 **FINDINGS OF FACT**

17 1. Plaintiffs Obertos are the owners of the M/Y MAXIMO.
18 2. Defendant Platypus is a Washington corporation with its principal place
19 of business in Port Angeles, Clallam County, Washington.

20 3. Defendant operates a shipyard with indoor painting facilities in Port
21 Angeles, Washington.

22 4. On October 22, 2013, Platypus submitted a bid to paint the MAXIMO
23 for \$120,000, plus additional work on a time and material basis.

24 5. On February 3, 2014, Stephen Oberto signed the November 27, 2013 bid
25 committing to paint the topsides (only) of the boat for \$32,600.

26 6. On or about February 4, 2014, Stephen Oberto and Platypus signed a
27 written agreement dated February 4, 2014 to paint the MAXIMO for \$125,000 and for

1 other repair work to be performed by Platypus on the MAXIMO. The February 4,
2 2014 agreement is also a part of the parties' contract for Platypus' work on the
3 MAXIMO.

4 7. The February 4, 2014 proposal provides: "Haul out vessel for complete
5 paint from waterline up to top of mast using Awlgrip coatings. Owners choice of
6 colors."

7 8. "Awlgrip" is a brand of marine paint and coating products manufactured
8 by AkzoNobel Coatings, Inc., whose parent company is AkzoNobel N.V., a multi-
9 national corporation headquartered in the Netherlands (collectively, "AkzoNobel").

10 9. The February 4, 2014 proposal provides:

- 11 • "All paint finishes are guaranteed one (1) year for gloss retention and
12 adhesion";
- 13 • "Platypus Marine guarantees our own workmanship for a one-year
14 time period";
- 15 • "Any additional work or warranty will be performed at the Platypus
16 marine facility."

17 10. The February 4, 2014 Proposal provides: "All coatings will be applied
18 according to Manufacturer's specifications and procedures." The manufacturer's
19 (AkzoNobel's) specifications and procedures for the application of Awlgrip coatings
20 are set forth in a publication entitled the "Awlgrip Application Guide."

21 11. The February 4 proposal also provides in pertinent part:

22 004. Paint Hull Topsides: Sand, prime with Epoxy 545 primer followed
23 with two coats Awlgrip finish coating; includes transom with stripes and
24 graphics on transom and sign board; includes all materials (color to be
specified by owner). If a post cure is needed it will add additional cost.

25 12. It was a basic assumption of the agreement that Platypus would be
26 painting over a system that was compatible with Awlgrip.

1 13. Under the terms of the agreement, the Obertos would be responsible on a
2 time and material basis for any additional costs related to taking the coatings down to a
3 suitable surface to apply Awlgrip paint.

4 14. Under the terms of the agreement, the Obertos would be responsible on a
5 time and material basis for any additional costs related to refairing the boat.

6 15. As delivered to the Platypus facility on or about February 3, 2014, the
7 MAXIMO's hull topsides bore several layers of existing coatings over its fiberglass
8 substrates. The coatings on the MAXIMO as delivered to Platypus were in poor
9 condition. The coatings were faded and worn. There were issues with print through
10 and the surface was not fair.

11 16. On or about February 3, 2014, Platypus hauled the MAXIMO, pressure-
12 washed it, brought the vessel into its indoor facility, and set it up on blocks.

13 17. In addition to other conversations between Platypus and Stephen Oberto,
14 a "captain meeting" was held on a weekly basis to discuss the project.

15 18. The Awlgrip Application Guide sets forth procedures for the
16 compatibility testing of a vessel's existing coatings prior to the application of Awlgrip
17 coatings.

18 19. Platypus did not perform a compatibility test on the coatings on the hull
19 topsides.

20 20. Had Platypus performed a compatibility test "according to
21 Manufacturer's specifications and procedures," it would have been discovered that the
22 pre-existing system was not compatible with Awlgrip.

23 21. The Awlgrip Application Guide sets forth procedures for surfacing and
24 fairing the surface of a boat. Surfacing is accomplished using a high-build product to
25 fill in small imperfections on the surface of the boat. Fairing is accomplished using a
26 fairing compound to set the shape and finish of the yacht.

1 22. Given the issues with the surface of the MAXIMO, Platypus discussed
2 with Stephen Oberto two options: surfacing the hull of the boat or refairing the hull of
3 the boat. The surfacing option would be accomplished by sanding the existing coatings
4 smooth and applying highbuild over the existing coatings. The fairing option would be
5 accomplished by removing all of the current coatings on the vessel down to the
6 fiberglass substrates and then applying a fairing compound. Platypus explained that to
7 guarantee a yacht quality finish it would be necessary to undertake the second option:
8 refair the boat. The refairing option was substantially more expensive than the
9 surfacing option.

10 23. The Obertos did not want to pay for the cost of re-fairing the boat. They
11 indicated they were fine with a commercial finish and, therefore, only authorized the
12 first option: surfacing the boat.

13 24. The agreement to surface the boat was included in a signed captain's
14 report where the parties agreed: "Hull print through Repair: Sand down and Prime
15 hull with ultra build to fill print through."

16 25. As per the agreement, Platypus surfaced the MAXIMO by sanding the
17 existing surfaces of the MAXIMO's hull topsides, exposing various layers of her
18 existing coatings.

19 26. As per the agreement, Platypus did not take the MAXIMO's hull topside
20 coatings down to fiberglass substrates prior to repainting the vessel.

21 27. As per the agreement, on or about February 17, 2014, Platypus applied
22 Awlgrip "Highbuild" primer coatings to the MAXIMO's hull topsides over layers of
23 existing coatings that remained on the hull after sanding.

24 28. As per the agreement, on or about February 28, 2014, Platypus applied
25 Awlgrip "545" primer coatings to the MAXIMO's hull topsides, over the Awlgrip
26 "Highbuild" primer that had been previously applied by Platypus.

1 29. As per the agreement, on or about March 7, 2014, Platypus applied
2 Awlgrip topcoats, colored “Flag Blue,” to the MAXIMO’s hull topsides, over the
3 Awlgrip “545” primer that had been previously applied.

4 30. The cost of painting the hull topsides was as follows:

001	Haul Out and Launch	\$1,180.00
003	Pressure Wash	\$1,170.00
004	General Protection	\$1,336.60
004B	General Protection	\$1,163.40
008	Hardware Removal (50% per testimony of Bruce Bryant, December 21, 2017, p. 498, lines 6-13)	\$5,350.00
009	Hardware Reinstall (50%)	\$25.56
009B	Hardware Reinstall (50%)	\$5,724.44
0120	Hull Repairs	\$1,913.04
0121	Hull Print Through Repairs	\$19,000.00
0125	Paint Hull Topsides	\$30,000.00
1209	Caulking	\$4,500.00
0212	Fiberglass Repair	\$10,292.28
0002	Blocking	\$1,170.00
	Facility Fees	\$6,664.00
	Subtotal	\$89,489.32
	Tax (8.4%)	\$7,517.10
	Total Paid to Paint Hull Topsides	\$97,006.42

16 The costs of fiberglass and hull repairs are unrelated to the costs associated with
17 painting the boat and, therefore, are deleted from the above-stated tally in order to
18 obtain an accurate total cost associated with Platypus’ paint work on the hull topsides.
19 After tax, this total is \$83,775.86 (“Amount Charged”). The Obertos paid Platypus
20 \$58,775.86 for this work. This was calculated by deducting the \$25,000 holdback from
21 the Amount Charged.

22 31. On or about April 10, 2014, Platypus requested the Obertos and
23 AkzoNobel Technical Field Representative Curtis “Ray” Tucker (“Tucker”) come to
24 Platypus’ facility to inspect the work on the MAXIMO, because a cosmetic problem
25 had arisen with the coatings.

1 32. On or about April 11, 2014, Stephen Oberto, Platypus, and AkzoNobel's
2 Mr. Tucker met at Platypus' facility to inspect the vessel and discuss the problems that
3 had arisen with the coatings on the MAXIMO.

4 33. As memorialized in a letter drafted by Platypus dated April 11, 2014,
5 which was signed by Stephen Oberto and Platypus' President, Judson Linnabary,
6 Platypus stated that it "will be working closely with the Awlgrip Company and their
7 representative to come up with a solution to the paint problems we are experiencing on
8 Maximo. It is our intention to remedy this situation and correct the hull defects
9 regarding the paint shrinkage/print through, in a manner that insures the best possible
10 outcome."

11 34. The parties agreed that the Obertos could withhold the sum of \$25,000
12 from their payment on Platypus' final invoice.

13 35. Platypus contacted a number of experts to determine how to resolve the
14 problem.

15 36. On or about October 6, 2014, the Obertos returned with the MAXIMO to
16 Platypus' facility in Port Angeles.

17 37. On or about October 7, 2014, Stephen Oberto, Platypus, and
18 AkzoNobel's Tucker met at Platypus' facility to inspect the MAXIMO and to discuss
19 the problems with her coatings. The parties and Tucker agreed that core samples from
20 the MAXIMO's hull should be taken and sent to the Awlgrip laboratory for testing and
21 analysis in order to identify the root cause of the coatings defects.

22 38. While the MAXIMO was at Platypus, Platypus explained to Stephen
23 Oberto that it would cost \$250,000 to remove all of the coatings and refair the boat.
24 Stephen Oberto refused to pay the costs of refairing the boat.

25 39. On or about October 7-8, 2014, two core samples, each being
26 approximately 2.5 inches in diameter, were taken from the MAXIMO's hull topsides
27 and shipped to the Awlgrip laboratory in England for testing and analysis.

1 40. On or about October 8-9, 2014, Platypus patched the two areas on the
2 MAXIMO's hull topsides from which the core samples had been taken and touched-up
3 the surrounding topcoat paint.

4 41. On or about October 10, 2014, the MAXIMO was re-launched from
5 Platypus' facility.

6 42. On or about October 31, 2014, AkzoNobel issued an email and lab report
7 to Platypus containing the analysis of the two core samples that had been taken from
8 the MAXIMO. The report contained the following chart that discussed the various
9 layers of coatings:

Layer	Color	Thickness (µm)	Spectral Interpretation / Comments
1	Dark blue	40 - 50	Good match to Awlgrip Topcoat.
2	Off-white	40 - 50	Good match to Awlgrip 545 Primer.
3	Pale grey	430 - 460	Good match to Awlgrip High Build Epoxy Primer.
4	Green	0 - 30	Poly(ester:urethane). Possibly Awlgrip Topcoat.
5	Off-white	20 - 40	Good match to Awlgrip 545.
6	Dull green	50 - 110	Soft, slightly rubbery coating. Polyurethane containing crystalline silica. No good product matches.
7	Off-white	20 - 70	Soft, slightly rubbery coating. Poly(ether:urethane) with talc and crystalline silica. Contains some micaceous iron oxide particles.
8	Yellow/brown, clear	<10	Too thin to sample. Not analyzed.
9	Off-white	370 - 420	Styrenated <i>iso</i> -phthalate polyester.

21 43. Marine surveyor Reisner correctly identified layer 7 as fairing compound
22 and layer 9 as the gel coat substrate.

23 44. The last page of this initial Awlgrip lab report contains a
24 "recommendation" section stating the following: "To repair the reported issue it is
25 recommended to remove all existing coatings that are not compatible with the Awlgrip
26
27

1 coatings system. Use the coatings compatibility & adhesion test in our Application
2 Guide to determine compatibility where unknown coatings are suspected.”

3 45. In order to assure paint adherence to a compatible surface, all coatings,
4 including the fairing compound, would have to be removed.

5 46. On or about November 5, 2014, AkzoNobel issued an email and revised
6 Awlgrip lab report to Platypus.

7 47. On or about November 10, 2014, Platypus emailed the Obertos the
8 revised version of the Awlgrip lab report with a cover email stating, “Hi Kim/Steve,
9 This is what was sent to us by awlgrip. We have been over it last week with
10 discussions and I have done a lot of research as well. I would like to talk to you about
11 this and try to come to a decision with you guys and schedule your boat when
12 convenient for you and we can accommodate the work.”

13 48. On or about November 11, 2014, the Obertos emailed Platypus,
14 acknowledging their receipt of the Awlgrip lab report, and requesting that Platypus
15 send a proposal to resolve the paint issues on the MAXIMO.

16 49. During the approximate time frame of November 11-13, 2014, Platypus
17 communicated with AkzoNobel’s Tucker and requested that Tucker draft a document
18 that would further describe the Awlgrip lab report.

19 50. On or about November 13, 2014, Tucker issued an undated letter, stating
20 the following:

21 There are a couple of different ways that this problem can be fixed. The
22 removal of all coatings and starting over would insure that the problem
23 would be resolved. However, this may not be feasible for either Platypus or
24 the Obertos. A second alternative would be to do further testing on some of
25 the impacted areas on the hull side to check the integrity of the damaged
26 coatings. If the testing concluded that it would be worth attempting a scuff
27 and shoot then that would be best for all involved. Unfortunately Awlgrip
 would only be able to warranty the first alternative of the removal of all
 coatings, Awlgrip warranties are limited to approved schemes and since
 some of the existing coatings have been determined to be single pack, and
 are not part of an approved scheme no warranty is allowed. This does not
 mean that this is the best alternative for the parties involved. Obviously a
 two pack paint scheme on Maximo has existed over the top of a one pack

1 paint scheme for some time. It is worth investigating the second alternative
2 to avoid further financial impact to either party and two avoid a lengthy full
3 re-fair.

4 51. On December 15 and December 17, 2014, Reisner examined the
5 coatings on the MAXIMO. Reisner did not notice any problems with adhesion or
6 gloss retention.

7 52. The Obertos withheld \$25,000 under their contract with Platypus.

8 CONCLUSIONS OF LAW

9 1. This court has jurisdiction under 28 U.S.C. §§ 1333 and 1367.
10 2. Venue is proper pursuant to 28 U.S.C. § 1391.
11 3. The contract in this case is maritime in nature as it concerned the
12 painting and repair of a boat. *Kossick v. United Fruit Co.*, 365 U.S. 731, 735, (1961);
13 *THE JACK-O-LANTERN*, 258 U.S. 96, 42 S. Ct. 243, 66 L. Ed. 482 (1922).

14 4. Basic principles of the common law apply to maritime contracts. *Clevo
Co. v. Hecny Transp., Inc.*, 715 F.3d 1189, 1194 (9th Cir. 2013).

15 5. Oral contracts are generally regarded as valid by maritime law. *Kossick*,
16 365 U.S. at 734; *Texaco Exp., Inc. v. Overseas Tankship Corp.*, 573 F.2d 717, 720 n.8
17 (2d Cir. 1978); *Sun Oil Co. v. Dalzell Towing Co.*, 55 F.2d 63, 64-65 (2d Cir.), *aff'd*,
18 287 U.S. 291 (1932).

19 6. The parties' contract in this case is a patchwork of oral and written
20 statements, evidenced by Platypus' signed bid, contemporaneous oral agreements and
21 subsequent written promises. There was never, at any time, any fully integrated,
22 written document containing all the material terms of the parties' contract.

23 7. The parties also agreed that Platypus would surface the MAXIMO: "Hull
24 print through Repair: Sand down and Prime hull with ultra build to fill print through."

25 8. Platypus breached the contract by failing to perform the compatibility
26 testing outlined in the Awlgrip specification manual.

1 9. Under general contract law, “a party to a contract who is injured by its
2 breach is entitled to compensation for the injury sustained and is entitled to be placed,
3 insofar as this can be done by money, in the same position he would have occupied if
4 the contract had been performed.” *Rathke v. Roberts*, 33 Wn.2d 858, 865 (1949).
5 However, “he is not entitled to be placed in a better position than he would have been
6 in if the contract had not been broken.” *Id.*

7 10. In the present case, a primary assumption in the formation of the contract
8 was that the existing coatings were compatible with Awlgrip and could be painted
9 over. At the time of entering into the contract, Platypus could not have known the
10 make of the underlying coatings. However, the failure of Platypus to appropriately test
11 the underlying coatings breached the contract by failing to apply the specified Awlgrip
12 paint manufactured by AkzoNobel “according to Manufacturer’s specifications and
13 procedures.”

14 11. Because of this breach, the Obertos are entitled to be placed in the same
15 position as if the contract was never broken. Because the Obertos and Platypus had
16 also agreed that the Obertos did not want to pay for the cost of refairing the boat and
17 only authorized surfacing the boat, it would place the Obertos in a better position than
18 they had contracted for if the Court required Platypus to do the refairing or pay the
19 cost for doing so.

20 12. The Obertos are entitled to recover from Platypus the amount they paid
21 for the painting of the hull topsides, totalling \$58,775.86.

22 13. Federal maritime law displaces conflicting state law. *Wilburn Boat Co. v.*
23 *Fireman’s Ins. Co.*, 348 U.S. 310, 314 (1955). Under federal maritime law, the Court
24 applies the American rule that each party bears its own attorneys’ fees absent a
25 contractual provision or governing statute. *Golden Pisces, Inc. v. Fred Wahl Marine*
26 *Const., Inc.*, 495 F.3d 1078, 1081 (9th Cir. 2007).

1 14. Under the CPA, RCW §19.86, attorneys' fees and treble damages may
2 be awarded. To prevail on a CPA claim, a plaintiff must prove all five of the following
3 elements:

4 (1) an unfair or deceptive act or practice; (2) occurring in the conduct or
5 trade or commerce; (3) an impact upon the public interest; (4) an injury to
the plaintiff's business or property; and (5) causation.

6 *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778 (1986).

7 15. For purposes of the CPA, an act is only unfair or deceptive if it has "the
8 capacity to deceive a substantial portion of the public." *Sign-O-Lite Signs, Inc. v.*
9 *DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 561 (1992) (quoting *Hangman Ridge*, 105
10 Wn.2d at 531). Furthermore, for conduct to be capable of deceiving a portion of the
11 public, the actor must have "misrepresented something of material importance." *Hiner*
12 *v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 730 (1998), *rev'd on other grounds*,
13 138 Wn.2d 248, 978 P.2d 505 (1999). Conduct that occurs between two parties in
14 isolation is not the type of conduct regulated by the CPA. *Segal Co. (E. States), Inc. v.*
15 *Amazon.Com*, 280 F. Supp. 2d 1229, 1232, n. 3 (W.D. Wash. 2003); *see also Henery*
16 *v. Robinson*, 67 Wn. App. 277, 291 (1992).

17 16. This case involves a private dispute between the Obertos and Platypus
18 based on unique facts. None of the actions of Platypus were "deceptive," nor did they
19 have the ability to deceive a substantial portion of the public. The Obertos were not
20 damaged by any failure to produce the entirety of the original AkzoNobel report. Nor
21 have the Obertos established that the failure to produce the full AkzoNobel report
22 constituted a misrepresentation of the condition of the MAXIMO.

23 17. In the present case there is little or no chance of any isolated, unfair, or
24 deceptive act being repeated. The fact that Platypus has other customers is not
25 sufficient evidence that there is a likelihood of repetition. *Accretive Tech. Grp., Inc. v.*
26 *Adobe Sys., Inc.*, No. C15-309RSM, 2015 WL 4920079, *11 (W.D. Wash. Aug. 17,
27 2015). The Obertos have not established that there is a "likelihood that additional

1 plaintiffs have been or will be injured in exactly the same fashion [sufficient to change
2 this matter] from a private dispute to one that affects the public interest.” *Hangman*
3 *Ridge*, 105 Wn.2d at 790.

4 18. There is no reason to depart from the American rule regarding attorneys’
5 fees as outlined in *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240,
6 (1975).

7 19. The federal judgment rate should apply to any prejudgment interest
8 award absent substantial evidence that the equities justify a different rate. *Western*
9 *Pacific Fisheries, Inc. v. S.S. President Grant*, 730 F.2d 1280 (9th Cir. 1984). In the
10 present case, the equities do not justify a different rate.

11 DATED this 22nd day of February, 2018.

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15 BENJAMIN H. SETTLE
16 United States District Judge
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